SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1225

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

VANTAGE STEAMSHIP CORPORATION; SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC, GULF, LAKES AND INLAND WATERS DISTRICT; SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA,
Intervenors.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

This brief is submitted on behalf of the respondent-intervenor, Vantage Steamship Corp., in opposition to the petition for certiorari in the above-referenced matter.

Question Presented for Review

The question presented for review is as stated by the Court of Appeals below (7a):

> "Did the NMU violate section 8(e) of the Act by maintaining and enforcing Article I, section 2 * * * of the NMU-Commerce collective bargaining agreement? Section 8(e) makes it an unfair labor practice for a union and an employer
>
> to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person * * *.
>
> "Article I, section 2, which is entitled 'Sale and Transfer of Vessels,' provides:
>
> (a) The Company agrees with respect to any vessel which is presently under or may hereafter come under this Agreement, that if during the term of this Agreement said vessel is sold or transferred in any manner to any other business entity not covered by this Agreement for operation under United States flag (but not including a vessel which the Company bareboat charters and the charter is terminated), said vessel shall be sold or transferred with the complement of employees who either are or shall be provided by the Union in accordance with the terms of this Agreement, or such number as may be agreed upon between the Union and the transferee. The term 'transfer' shall be construed to include any chartering of a vessel by the Company.
>
> (b) The Company obligates itself to obtain for the benefit of the Union a written undertaking with

the Union to be executed by the business entity to which the vessel has been sold or transferred that for the full term of the Agreement all of its terms and provisions shall apply to said vessel except as hereinabove provided and that said business entity will fully comply with all of the terms and provisions of this Agreement and any amendments thereto to preserve the jobs and job rights of the Unlicensed Personnel covered by this Agreement and to protect and maintain the wages, pension rights and other economic benefits and working conditions provided such personnel under this Agreement."

Statement of the Case

The Petitioners apparently recognize that to state the case is to decide it adversely to their position. Their "Statement" in the Petition is, therefore, so circumlocutious that it obscures the essential and very basic issues that were decided below. The Court of Appeals' presentation of the facts is clear and will be quoted with only such additions as are helpful in understanding points raised by the Petition.

The simple issue is whether Article I, section 2 of a labor agreement between Commerce Tankers Corp. and the National Maritime Union violates the "hot cargo" prohibition of Section 8(e) of the National Labor Relations Act, as amended, 29 U.S.C. §158(e). This section [of the contract] provides in substance that if Commerce sells a ship to an American flag shipper not already under contract with the NMU, the ship will be sold with a crew provided by the NMU, and Commerce will obtain from the purchaser an undertaking to abide by the NMU contract.

At the time of the agreement, Commerce owned two ships and in December 1970 sold one of them, the S.S. Thalia. Since the purchaser was a signatory to the standard NMU contract, no problem of inter-union rivalry arose. It is also important to note that when the "Thalia" was sold all of the crewmembers were discharged from the vessel to be later replaced by a new and entirely different crew.

Shortly after the Commerce's sale of the "Thalia" Commerce agreed to sell its remaining vessel, the S.S. Barbara, to Vantage, which, together with its subsidiaries, operated a number of vessels whose employees were represented by the SIU. Very soon thereafter, both Commerce and Vantage found themselves caught between the competing demands of the two unions and frantic activity ensued in a variety of forums. Under pressure from the NMU, Commerce asked Vantage to give the undertaking required by Article I, section 2. The SIU threatened to strike all the vessels operated by Vantage if it stopped using the SIU hiring hall as the exclusive source of its unlicensed seamen.[1] Vantage understandably refused to accede to the NMU-inspired demand, and threatened to sue Commerce if it did not sell the S.S. Barbara, as it had agreed to do. Similarly, the NMU refused to waive its contractual rights and promptly secured an arbitration award restraining Commerce from delivering the "Barbara" to Vantage without complying with the ship transfer provisions of the NMU contract.

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1. Under the NMU contract, of course, Vantage would have to use the NMU hiring hall.

POINT I

There is no basis for this Court to review the NLRB's determination that the NMU's clause was designed to promote union institutional objectives.

As this Court pointed out in *National Woodwork Manufacturers Ass'n* v. *NLRB,* 386 U.S. 612 (1967), the literal language of Section 8(e) of the National Labor Relations Act is sweeping. However, as a supplement to the preexisting prohibition against union secondary activities under Section 8(b)(4), this Court held that certain exceptions which had been developed under the earlier law should be continued as exceptions to the new ban under §8(e).

In the *National Woodwork* case the Union had won a contract provision under which the employer agreed that it would not handle any doors "which have been fitted prior to being furnished on job." This was to be subject to a test as to (386 U.S. at 645):

> "whether, under all the surrounding circumstances, the Union's objective was preservation of work for [the employer's] employees, or whether the agreements * * * were tactically calculated to satisfying union objectives elsewhere."

The Court ruled that the *Woodwork* contract provision met this test. In evaluating the legitimacy of job preservation objectives this Court compared the Union's conduct in *Allen Bradley Co.* v. *Local 3, Electrical Workers,* 325 U.S. 797 (1945) where "the boycott in *Allen Bradley* was carried on, not as a shield to preserve the jobs of Local 3 members, traditionally a primary labor activity, but as a

sword, to reach out and monopolize all the manufacturing job tasks for Local 3 members." (386 U.S. at 630). That prohibitive objective was exactly the patent and proven goal of the National Maritime Union in the instant case.

Since the *Woodwork* case (and before as part of the development of the law under Section 8(b)(4)) the Board and the Courts have charted a number of clear guidelines as to the difference between prohibited Union aggrandizement and the exception of job preservation.

For instance, as the Court below pointed out, the Board and the Courts worked out a distinction between prohibited "signatory" contracts and permissible "union standards" contracts. The distinction is illustrated in the distinctions drawn with respect to different types of union contract limitations on an employer's right to subcontract. Thus it may be permissible for the parties to prohibit *all* subcontracting since the effect of such prohibition necessarily serves a job preservation purpose. However, a clause which limits subcontracting to only those companies which have labor agreements with a specific union are prohibited. The distinction is that the latter type of clause has objectives beyond the preservation of jobs for employees in the bargaining unit; it serves purposes "elsewhere" and those prohibited purposes are the jurisdictional aspirations of the affected Union. *Painters District Council 48* v. *NLRB*, 117 App. D.C. 233, 328 F.2d 534 (1964); *NLRB* v. *Milk Drivers Local 753*, 392 F.2d 845 (7th Cir. 1968); *NLRB* v. *Teamsters Joint Council 38*, 338 F.2d 23, 28 (9th Cir. 1964); *Meat & Highway Drivers Local 710* v. *NLRB*, 118 U.S. App. D.C. 287, 335 F.2d 709, 717 (1964).

The clause being considered in this case prohibited the transfer of any ship to another employer unless that employer accepted the NMU contract including its union recognition clause. Thus a transfer was not conditioned on the preservation of jobs for the men on the particular vessel but was conditioned, rather, on the recognition by the employer of the NMU as the Union of seamen (whoever they might be) on the vessel in question.

The Board's Determination of the Appropriate Unit

The NMU has tried to avoid the obvious conclusion that it was seeking to preserve or extend its jurisdiction by claiming that the job preservation objective included the jobs and the individuals who might at some time be identified to those jobs through the Union's hiring hall. Since the Union hiring hall embraces all the NMU's members or, more realistically, all those seamen willing to come under the NMU's contracts, the scope of its assertion of job preservation becomes coextensive with the Union's assertion of jurisdiction.

Within the statutory language itself there are two clear indications that there was no Congressional intent to permit maritime unions with hiring halls to force employers to limit their dealings with others so as to preserve the Union's jurisdictional claims.

First, in the so-called "construction industry" proviso to Section 8(e) Congress specifically designated *the single* hiring hall industry to which the strictures of the law would not apply. Despite the hiring hall characteristic of the maritime industry no exception was made for it.

Second, the adoption of the NMU's view would effectively write the prohibition against jurisdictional strikes out of the statute (Section 8(b)(4)(D)) for the maritime industry since every assertion of jurisdiction would simply be equated to an attempt to "preserve" jobs for all of the seamen who, according to the NMU, it *already* represents.

The determination of the scope of the bargaining unit becomes important both in identifying the jobs to be preserved and also in evaluating the union's intent as to the reach of its demands.

It is now well established that the appropriate unit for collective bargaining in the maritime industry is a fleet-wide unit. *Moore-McCormack Lines, Inc.*, 139 N.L.R.B. 796 (1962). Moreover, it was that very landmark decision which eventually prompted the NMU to evolve the clause now in question before this Court. The fleet-wide unit established in *Moore-McCormack* was peculiarly adapted to the conditions in the maritime industry. In essence it provided that upon sale or transfer of a vessel the job opportunities available on board that vessel accreted to the bargaining unit of the transferee. It was decided by the Board that a settled procedure for determining representation and homogeneity of representation within a single fleet would be most likely to stop the bitter jurisdictional conflicts that periodically ravaged the maritime industry. Thus, according to the Board's established policy, if the tables had been turned and *Vantage* had sold a ship to *Commerce*, SIU seamen employed by Vantage would have, in due course left the ship and when *Commerce* began its operation of the vessel it would have relied upon its NMU contract to acquire

new seamen from the NMU hiring hall. The same procedure but with an opposite result would have obtained in the instant case had there been a completed transfer of the "Barbara" from Commerce to Vantage. That is, by application of the *Moore-McCormack* doctrine, the "Barbara" would have, as a matter of law, accreted to the Vantage fleet and come under the labor contract between SIU and Vantage. Indeed, one of the most critical points that must be understood in the present case is that the implementation of the NMU contract clause in conjunction with the application of the Board's bargaining unit rules effectively forestalled any possible transfer of a vessel from an NMU contracted unit to an SIU contracted owner. This necessarily follows since the NLRB has, since 1962, required the acquiring fleet owner to recognize its incumbent union while the NMU contract clause attempts to force recognition of that union as a bargaining representative.

The development of the subject NMU contract clause came shortly after the Board's decision in *National Maritime Union of America* [*Overseas Carrier Corp.*], 174 N.L.R.B. 216 (1969). In that case the Board ruled that a change in the stock ownership interest of the owning corporation resulted in an accretion to the new owners' fleet. As had happened in a number of situations the effect was to move a number of vessels from NMU jurisdiction to SIU jurisdiction. Thus, the timing and the industry background of the development of the NMU contract clause plainly indicate that the simple objective of the NMU was to prevent the transfer of ships from NMU fleets to SIU fleets and to preserve the union's jurisdiction over as many vessels as possible. See also *National Maritime Union of*

North America, AFL-CIO [*Prudential-Grace Lines, Inc.*], 194 N.L.R.B. No. 199 (1972); *McLeod* v. *National Maritime Union of America*, 457 F.2d 40 (2d Cir. 1972).

Of course, the effect of the Board's fleet-wide doctrine was equally applicable to SIU as well as to NMU contracted companies. If the NMU type of contract clause were permitted, it would permit only transfers of SIU vessels to NMU companies. However, the more likely result would be for the SIU to retaliate and insist upon similar clauses in its own labor contracts. The result of that development would be to divide the American Merchant Marine into two separate components and eliminate the possibility of any sales or transfer between SIU and NMU contracted companies. The Board has recognized that such a stagnation in the transferability of vessels would be contrary to the public interest and one need not belabor the obnoxious quality of such a result.

The NMU contract clause is limited to United States flag operations. If the objective was simply to preserve job opportunity, the NMU would have insisted upon a flat prohibition of such foreign flag transfers. The contract language even provides that the number of employees serving under the United States flag shall be so many "as may be agreed upon between the union and the transferee" (A. 18). The concern, therefore, is not for the *number* of jobs, but for the identity of the union which is going to "cut the deal."

Furthermore, the record in this case contains uncontradicted testimony concerning statements by the NMU's

Secretary-Treasurer as to the anti-SIU objective of the contract clause. The following is an excerpt from testimony by Commerce's Assistant Secretary, D. David Cohen, concerning his dealings with the NMU:

> "Q. When you pointed out to the NMU that the jobs would be lost in either event, if you sold foreign or if they permitted the sale to be made to Vantage, did Mr. Wall make any comment? A. Yes, he did.
>
> "Q. What did Mr. Wall say? A. He said they would rather be lost—
>
> "Q. Speak up, sir. A. *He said he would rather they be lost foreign than be lost to the rival union SIU.* He was talking in the context of this being a principle, an important principle to the NMU which they were seeking to uphold.
>
> "Mr. Sovel made the comment that the granting of this dispensation wouldn't look very good in the proceedings that were then pending.
>
> "Q. There is no doubt in your mind, sir, that Mr. Wall made the statement, in words or in substance, that you have just attributed to him, that he would sooner the sale went foreign than see it go to a rival union? A. Yes, *he said Mr. Nathanson and I didn't understand the intense rivalry between the SIU and NMU.*" [Emphasis supplied.]

The NLRB has determined that for the purposes of effective bargaining the appropriate bargaining unit in the maritime industry is a fleet-wide unit. Such a unit is of course smaller than an industrywide unit and still smaller than a unit comprised of all individuals who might use the NMU hiring hall which is the unit NMU contends it is entitled to protect. The record plainly establishes that the NMU clause was not intended to protect and does not in fact protect the positions of those individuals actually serving on board the vessel as witnessed by the dis-

charge of the seamen on board the "Thalia." Both the Board and the Trial Examiner recognized that the appropriate unit for job preservation purposes "is the single employer unit and not a multi-employer or industrywide unit" (20a). Of course, as the Board goes on to point out, that single employer unit may at any single point of time, given the hiring hall practices of the industry and the indefinite duration of maritime employment, include different employees referred from NMU hiring halls. However, this possibility of reexamining the identity of the individuals *actually* serving in the vessel at various points in time does not equate with the patently defective NMU contract clause whose asserted purpose is to "preserve" the jobs of an *infinite* number of seamen co-extensive with its own possible membership. To state the union's position is to explain it in terms of the preservation of its own jurisdiction rather than preservation of jobs as contemplated in the *Woodwork* case. Thus, the Board reached the determination that regardless of what might happen in the future, the only jobs that might properly be subject to a claim of job preservation would be those "of the employees covered by the contract in the event of a sale." This necessarily means employees of the seller himself and not possible employees or individuals who might be employed by the buyer.

The National Labor Relations Board, as confirmed by the Court below, has made a determination as to the appropriate unit which may be considered for job preservation purposes as an exception to the general prohibitions in Section 8(e). That determination has been made by the Board on logical, rational grounds in a decision which takes

into particular account the special circumstances in the maritime industry and the rules for the regulation of industrial relations in that industry as they have been developed by the Board since at least 1962. The decision is correct by any standard, it is consistent with the judicial decisions which have passed upon similar questions, and it is a decision peculiarly within the competence of the Board, *NLRB* v. *S.E. Nichols-Dover, Inc.*, 414 F.2d 561 (3d Cir. 1969), cert. denied, 397 U.S. 916 (1970); *NLRB* v. *The Lord Baltimore Press, Inc.*, 370 F.2d 397 (8th Cir. 1966). Moreover, against the background of this particular industry and the experience that the Board has had with it in the instant case and in the many situations which have involved the intense rivalry between the two major maritime unions, the Board has made a determination that the *objective* of the NMU clause went beyond permissible job preservation purposes and reached out in an effort to control the labor relations of others. That, again, is a decision peculiarly within the competence of the National Labor Relations Board. *NLRB* v. *Denver Building and Construction Council*, 341 U.S. 657 (1951).

Conclusion

For the foregoing reasons, we respectfully submit that the decision of the National Labor Relations Board as confirmed by the Court of Appeals should not be disturbed and that it would be inappropriate to grant the instant Petition for Certiorari.

Respectfully submitted,

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